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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

GURPARTAP SINGH BIRK,
SUKHVINDER SINGH,
VIRINDER SINGH, JASBIR SANDHU, and
JATINDER SINGH AHLUWALIA,

Petitioners

VERSUS

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where by statute federal prosecutorial jurisdiction is predicated on the "official guest" status of the victim of a crime; and, where by statute "official guest" is defined as a foreign national in the United States as an official guest of the government "pursuant to designation as such by the Secretary of State;" and, where the individuals responsible for initiating and approving such designations testify unequivocally that the victim was not designated an official guest, can Congress' clear mandate be ignored by predicating jurisdiction not on designation but rather, on the happenstance that State Department functionaries initiated security measures to protect the victim?

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Gurpartap Singh Birk, Sukhvinder Singh, Virinder Singh, Jasbir Sandhu and Jatinder Singh Ahluwalia, by their respective counsel and through counsel of record John Wilson Reed, petition for a writ of certiorari to review the decision of the United States Court of Appeals for the

Fifth Circuit reversing the district court's order dismissing the indictment.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 797 F.2d 199 (5th Cir. 1986), and is reprinted as Appendix A. The unpublished order of the district court dismissing the indictment is reprinted as Appendix B.

STATUTES AND RULES IMPLICATED

The statutes and rules implicated in petitioners' case are as follows:

18 U.S.C. §1116 (Appendix C)

18 U.S.C. §1117 (Appendix D)

22 U.S.C. §2658 (Appendix E)

22 CFR §2.4 (Appendix F)

JURISDICTION

The Fifth Circuit opinion reversing the district court order of dismissal was filed August 15, 1986. The Fifth Circuit order denying petitioners' request for rehearing and rehearing en banc is dated October 3, 1986. This petition is timely, coming within 60 days of that order. Jurisdiction is present under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

In May of 1985, Bhajan Lal, a Hindu, and Chief Minister of the Indian state of Haryana, travelled to the United States on personal business for the mundane purpose of having his eyes examined by a New Orleans physician. While here, Lal became the target of an alleged assassination plot that was foiled primarily

through the efforts of the New Orleans Police Department, supplied with information by State Department security officials. Arrested for their roles in the plot were the five defendants, all Sikh Indians. Once arrested, the critical issue became: who would prosecute the defendants, the State of Louisiana or the government of the United States? That was, and remains, the issue to be resolved.

It is a crime to kill, or conspire to kill, another human being. It is a federal crime to kill, or conspire to kill, an "official guest" of the United States government. 18 U.S.C. §§1116, 1117.¹ Alleging that Bhajan Lal was

¹Under the same statute it is also a federal crime to kill an "internationally protected person" or a "foreign official." All three categories have particular statutory definitions.

invested with that status, it was the federal government that indicted the five defendants for conspiring to murder him. The defendants moved to dismiss the indictment on the ground that although Bhajan Lal may have been a person of interest to some functionaries in Washington, he was never afforded the position of an "official guest." While many people are of interest to many government employees at many levels, an "official guest" for the purposes of the federal criminal statutes relative to murder is given a special and precise statutory definition:

"Official guest" means a citizen or national of a foreign country present in the United States as an official guest of the Government of the United States pursuant to designation as such by the Secretary of State.

18 U.S.C. §1116(b)(6).

An evidentiary hearing was conducted

on the motion to dismiss during which government witnesses testified that no one in the State Department ever designated or even considered Lal to be an official guest. The Secretary of State did not do so; nor did the Secretary of State's designee. No one did. In fact, the person who could have initiated the designation process was not even aware of its existence. It was both clear and uncontroverted that the process was neither begun nor contemplated. Accordingly, the district court held that Lal was not an official guest of the United States government, that jurisdiction was therefore lack-

ing and that the indictment would be dismissed.²

Pursuant to 18 U.S.C. §3731, the government appealed the district court decision. The Fifth Circuit reversed. Ignoring all facts showing that no one had ever even considered Bhajan Lal to be an official guest, much less invoked the statute, the court saved the government's case by proclaiming him an official guest simply because security officials took an interest in his safety.³ United States v. Birk, 797 F.2d 199, 203 (5th Cir. 1986). For the court's conclusion there was no

² Betraying its weak case, the government had initially charged the defendants with killing an "internationally protected person." Recognizing that that claim was hopeless, the government filed the superseding indictment at issue here which added the further allegations that Bhajan Lal was also an "official guest" and "foreign official." The district court held that Bhajan Lal qualified for none of the three categories.

³ The government conceded that Lal was not

basis at all beyond a willingness to bend the law to the government's will.

REASONS FOR GRANTING THE WRIT

The hard truth of this case is that the State Department through ignorance, incompetence or indifference did not do those things Congress required it to do if it wished to accord someone the special status of "official guest." Not having discharged its duty, the executive was left in the embarrassing position of not having the jurisdiction necessary to prosecute this case. The Fifth Circuit, however, stepped in and quite literally manufactured federal jurisdiction where none existed, thus aiding the government in its attempt to cover-up its blunder. In so

an "internationally protected person" and the panel did not reach the issue of "foreign official."

doing, the court established dangerous precedent by permitting the executive's perception of international exigencies to take precedence over the dictates of Congress. The consequences of the Fifth Circuit's decision are far reaching for this was a case of first impression, United States v. Birk, 797 F.2d 199, 202 (5th Cir. 1986); the precedent established will provide a corrupt foundation for a whole line of cases that will permit federal jurisdiction to turn on the whim of the executive. This Court, in the exercise of its supervisory authority over the lower courts, has here the opportunity to prevent this result and to reaffirm the promise of an independent judiciary unswayed by the tides of politics.

A. The Statute.

When, in 1972, Congress first considered whether to extend federal jurisdiction to cases involving crimes against foreign nationals, the proposed legislation spoke only of "foreign officials;"⁴ there was no provision regarding "official guests." Shortly after the "foreign official" legislation passed the House of Representatives, however, 11 athletes were tragically murdered at the Munich Olympics. Realizing that the original legislation would not have provided federal jurisdiction had such an act of terrorism occurred in this country, Senators McClellan and Hruska proposed an

⁴"Foreign officials" are either officers of Cabinet rank or above of a foreign government or persons "duly notified" to the United States and in this country on "official business." 18 U.S.C. §1116(b)(3)(A) and (B). See Appendix C for full text of the statute.

amendment covering those foreign citizens visiting this country as "official guests."

Senator McClellan observed:

[T]he measure [enacted by the House] would not offer any expanded protection for foreign citizens, who might visit our shores as official guests of our country as members of an Olympic contingent.

* * *

The amendment I propose will extend the umbrella of Federal protection to cover "official guests" of the United States as designated by the Secretary of State so as to include visiting athletes in international competition.

S. Rep. No. 1105, 92 Cong., 2d Sess. 304, reprinted in 1972 U.S. Code Cong. & Ad. News 4318-19.

Concern for the Olympic athletes undoubtedly provided the impetus for the "official guest" amendment; however, it is clear that Congress intended to extend federal jurisdiction to crimes committed against other individuals as well. Thus,

the Committee to the Judiciary noted that Senator McClellan's proposal "will operate to protect the rights of visiting artists, academic and scientific groups, and other groups and individuals who ought not be beyond the pale of Federal concern." Id. At the same time, Senator Hruska emphasized that official guest status was something out of the ordinary "to be used sparingly and only in those cases in which a nonofficial is in this Nation on special business, such as the Olympics, and not simply as a tourist or businessman." Cong. Rec. S. 31033 (daily ed., Sept. 18, 1972)(statement of Sen. Hruska).

In order to differentiate between those extraordinary foreign nationals deserving official guest status and those for whom more traditional concern is appropriate, Congress decided that

official guest status should only be conferred pursuant to specific designation by the Secretary of State. William P. Rogers, then the Secretary of State, acknowledged that the designation would apply only to persons "whom I have designated as official guests of the United States." He further observed that the legislation "will allow me to designate individuals or groups of individuals who are here for important international sports or other events." Id. (letter from William P. Rogers, Secretary of State). Accordingly, the final enactment of 18 U.S.C. §1116(b)(6) provides:

"Official guest" means a citizen or national of a foreign country present in the United States as an official guest of the Government of the United States pursuant to designation as such by the Secretary of State.

Although Congress explicitly granted

the power to confer official guest status to the Secretary of State and to the Secretary of State alone, The Secretary of State, pursuant to 22 U.S.C. §2658,⁵ has redelegated this authority to the Chief of Protocol. 22 CFR §2.4 (1986).⁶ Thus, Congress provided only

⁵22 U.S.C. §2658 provides:

The Secretary of State may promulgate such rules and regulations as may be necessary to carry out the functions now or hereafter vested in the Secretary of State or the Department of State...

See Appendix E for the full text of 22 U.S.C. §2658.

⁶22 CFR §2.4 provides:

The Chief of Protocol shall also maintain a roster of persons designated by the Secretary of State as official guests.... Pursuant to section 2658 of Title 22 of the U.S.C., the authority of the Secretary of State to perform the function of designation of official guests is hereby delegated to the

(Footnote cont'd on next page.)

one way for an individual to become an official guest: by designation as such by the Secretary of State through the Chief of Protocol.

B. The Designation Process.

As Congress intended, the designation "official guest" is currently used only for cultural, educational and athletic groups, and then not extensively. In 1981, for example, there were only 24 such designations; in 1982, 14 or 15 designations; in 1984, there were designations for a small group of individuals and a large designation for the Louisiana World's Fair. As the person responsible for such designations testified there "had been very few" foreign nationals such as Bhajan Lal travelling independently and

Chief of Protocol.

See Appendix F for the full text of 22 CFR §2.4.

not with a cultural or athletic group who have received official guest designation. In 1985, the year Lal came to the United States, there were none. The Acting Chief of Protocol explained:

- Q. So the fact of the matter is that very few individuals are ever designated as official guests, is that correct?
- A. When the law was new and young and persons were more conscious of its existence we were receiving a great number of requests to designate persons as official guests.
- Q. Let me say within the last couple of years, very few persons are designated as official guests, is that right?
- A. It has tapered off considerably. And I would like to say that I believe that has come about as a result of misuse or lack of use on the part of the offices in the department where we have a tremendous change over with people coming and taking new assignments or going overseas or being posted elsewhere so that they have not become on top of or as

cognizant of this possibility
of recommending someone for
official foreign guest status.

Q. In the year 1985 no one, no
one individual was designated
as an official guest, is that
correct?

A. That's correct.⁷

The actual designation process is not complicated. It begins with a memorandum requesting that a specific person or, more commonly, a group of persons, receive official guest designation. The memorandum is then passed on to the Chief of Protocol who either approves or disapproves the request. If approved, the

⁷In light of this testimony, the Fifth Circuit's suggestion that "State Department personnel did not follow their customary paperwork procedures for designating Lal as an official guest," 797 F.2d at 201, is misleading. It falsely implies a bureaucratic oversight exceptional to a well-established routine. The record facts demonstrated, however, no such routine, but rather a State Department which simply did not regularly invoke the official guest status, and did not invoke it here.

person is designated an official guest of the United States, and his name goes on a roster. 22 CFR §2.4 (1986). Not everyone who asks for official guest status can expect to receive it. The Chief of Protocol clearly has the discretion to refuse to confer the special status and, indeed, the forms used specifically offer the choice of approval or disapproval.

C. Bhajan Lal.

Bhajan Lal did not come to the United States to represent his own country; nor did he come to represent his country's interests. He came for no greater reason than to visit his eye doctor in New Orleans. 797 F.2d at 200. It was, purely and simply, a personal visit. Based on the personal nature of Lal's business, it is debatable whether Lal was even an appropriate candidate for

official guest status, but even assuming that he was a good candidate, the fact is no individual in the State Department ever considered him an official guest. Indeed, it never even occurred to anyone that that he ought to be so designated.

The court of appeals sugar-coated the State Department's incompetence by characterizing it as merely a failure to "complete the paperwork required by its internal procedures." 797 F.2d at 201. On this record, however, it is judicially dishonest to suggest that the necessary steps for designation were set in motion and that the Chief of Protocol merely failed to complete the paperwork. It was never a question of failure to complete paperwork. It was a question of a process that was never begun, of a process that was never contemplated. The record gives

the lie. According to the Deputy Ass't Secretary for Security, neither the Secretary of State nor the Chief of Protocol acted in any way to designate Lal an official guest:

Q. ... there was never to your knowledge prior to May 6, I guess it would be, or at any-time there was no request made by anyone to have Mr. Bhajan Lal designated as an official guest of the United States?

A. That's correct, to the best of my knowledge.

Q. And to the best of your knowledge Mr. Bhajan Lal was never designated as an official guest of the United States?

A. That's correct.

Said the Acting Chief of Protocol:

Q. There was never a request made to the Chief of Protocol, Mrs. Roosevelt, to designate Bhajan Lal as an official guest of the United States, was there?

A. No.

Q. And I take it there has never been a designation by the

Chief of Protocol, Roosevelt, designating Mr. Lal as an official guest of the United States during the period of April and May, 1985?

A. No, not to my knowledge.

* * *

Q. Well, it's clear, is it not, that insofar as official guest is a word of art taken from a statute you have no doubt in your mind that Mr. Bhajan Lal was not an official guest, is that correct?

A. Yes, um humph.

It is little wonder the Chief of Protocol failed to act: she was not asked to do so. She was not asked because the official who knew of Lal's visit and could have initiated the process was inexperienced, overworked and did not know about the law, the process or anything else. The official explained, "if I would have known about what to do, I would have pursued it." But, he did not, and as a

result of bureaucratic ignorance and incompetence, absolutely nothing was done either to designate Bhajan Lal an official guest, or to contemplate his designation.

The unambiguous and unassailed testimony of these individuals should have ended the matter as far as federal jurisdiction was concerned and, for the district judge, it did. He ruled that Bhajan Lal was not an official guest of the United States government (see Appendix B). On appeal, however, the government argued, and the Fifth Circuit accepted, the notion that because Lal was the subject of federal interest and concern he was, for purposes of 18 U.S.C. §1116, designated an official guest. Beneath the court's facile conclusion lies a faulty syllogism: because Lal was a visitor to the United States he was a "guest" and

because the State Department showed some interest in him he was treated as an "official," therefore Bhajan Lal must have been an "official guest." Thus by such specious reasoning did the court conjure up federal jurisdiction and thereby shield from criticism and public embarrassment the executive's incompetence. Thus did the court of appeal purposely abdicate its responsibility to the law.

It was true enough that the United States government took an interest in Lal. Because India had indicated a concern that Lal could be the target of Sikh extremists, the State Department's Office of Security contacted a New Orleans field agent and directed him to inform the local police of Lal's arrival. Over the next few days the State Department Security Office and the FBI provided information to

the local New Orleans police about a possible plot. Then, after four of the five defendants were arrested, special agents from the State Department were actually dispatched to provide Lal with direct protection. Unquestionably, the executive branch acted prudently in seeing that protection was provided Lal, but the fact that protection was provided does not make him an official guest.

An individual need not be designated an official guest before security measures can be taken. According to the Deputy Ass't Secretary for Security, the United States government "routinely protects" persons like Lal. It does not, however, routinely designate persons official guests, as is indicated by the paucity of such designations in a country that each year receives thousands of dignitaries.

See, p. 15, supra. That there is no relation between security concerns and official guest status is demonstrated by the fact that agents of the federal government have been empowered to protect "distinguished visitors" like Lal since long before the enactment of 18 U.S.C. §1116. See, 22 U.S.C. §2666 and 18 U.S.C. §3056. Prosecutorial jurisdiction has never been a necessary corollary to the historical power to protect; though the court of appeal's decision now makes it one.

Congress left no room for the uncertainty engendered by the Fifth Circuit's decision. The statute and its meaning are clear: protection is neither the sine qua non nor even an element of official guest status; designation "as such" is. What the circuit court did was

create out of whole cloth an additional ground for jurisdiction not contemplated, and most certainly not approved, by Congress. This Court's supervisory jurisdiction should be invoked to put a halt to this clear example of judicial legislating and overreaching.

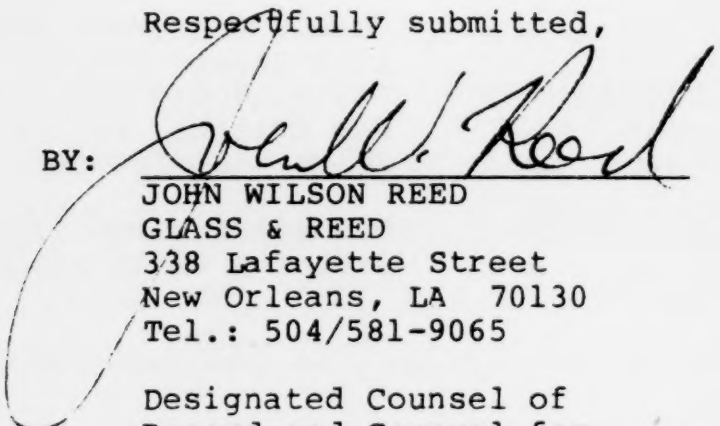
CONCLUSION

It may be that Bhajan Lal was a good candidate for official guest designation. It may be that the Chief of Protocol would have approved a request that he be designated as such. But the immutable facts remain: no one requested official guest designation for Lal; no one conferred it; in fact, no one thought of it. What the executive failed to do before the fact, the judiciary cannot do after. Certainly it cannot do so by reading into a statute

jurisdictional grounds that do not exist. Certiorari should be granted to review the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Wilson Reed, a member of the bar of this Court, hereby certify that copies of this petition for certiorari have been served on respondent, United States of America, by mailing three copies thereof, first class postage prepaid, to the Solicitor General, Department of Justice, Washington, DC 20503, and three copies to John Volz, Esq., U.S. Attorney, 500 Camp Street, New Orleans, LA 70130, this ____ day of November, 1986.

JOHN WILSON REED

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

GURPARTAP SINGH BIRK, SUKEVINDER
SINGH, VIRINDER SINGH, JASBIR
SANDHU AND JATINDER SINGH
AHLUWALIA,

Defendants-Appellees.

APPENDIX A

No. 85-3538

OPINION

Filed August 15, 1986

Before: Thomas Gibbs Gee, Henry A. Politz, and
Will Garwood, Circuit Judges.

Opinion by Judge Thomas Gibbs Gee

Appeal from the United States District Court
for the Eastern District of Louisiana
Patrick E. Carr, District Judge, Presiding

SUMMARY

Criminal Law

Appeal from a district court's dismissal of an indictment after ruling that it failed to state a federal offense. Reversed and remanded.

In 1985, Bhajan Lal, the Chief Minister of a state in India, came to New Orleans for eye surgery. The Indian embassy notified the State Department of the visit and expressed concern that Lal, a Hindu, might be the target of an attack by Sikh extremists. Although State Department personnel did not follow their customary paperwork procedures for designating Lal as an official guest,

they initiated security measures to protect him. Following State Department, FBI, and local police surveillance, five Sikhs were indicted for conspiring to kill Lal in violation of 18 U.S.C. §§ 1116 and 1117, which make it a federal crime to kill, attempt to kill, or conspire to kill, a "foreign official, official guest, or an internationally protected person." Finding that Lal did not fall within any of these three classifications, the district court dismissed the indictment.

[1] The issue on appeal is whether the State Department "designated" Lal an "official guest" within the meaning of § 1116. The defendants argue that Lal does not qualify as an "official guest" because the State Department failed to complete the paperwork required by its internal procedures. Those procedures delegate to the Chief of Protocol the task of designating official guests by formally placing their names on an official guest roster. [2] The Government contends that the State Department's internal procedures should not be dispositive of Lal's status. [3] The essence of "designation" in this context is distinguishing one class of foreign visitors—"official guests"—from other foreign visitors, and the question is whether the State Department decided to place Lal in this special class. The record shows that the State Department took substantial measures to insure Lal's safety. It initiated communications with local police, monitored the situation, and dispatched special agents to protect Lal. Because the State Department does not take such measures on behalf of ordinary foreign visitors, this conduct demonstrates that decisions were made within the State Department to place Lal within a class receiving special treatment. [4] The statutory language and legislative history do not indicate that Congress was concerned with the method by which foreign visitors were designated as "official guests," and [5] it would be both short-sighted and small-minded to turn the question of federal jurisdiction on the completion of a ministerial task when Congress intended that federal prosecutorial machinery be available in matters implicating the conduct of this country's foreign affairs. Accordingly, the State Department can and did confer "official guest" status by its informal conduct.

OPINION

THOMAS GIBBS GEE, Circuit Judge:

Defendants, a group of Sikhs, were charged with conspiring to assassinate the Chief Minister of an Indian state while he was in New Orleans last spring. The district court dismissed the indictment, ruling that it failed to state a federal offense because the Chief Minister was not a "foreign official, official guest, or internationally protected person" as required under 18 U.S.C. § 1116. We conclude that the target of this conspiracy was "designated" an "official guest" so as to establish a federal offense under 18 U.S.C. §§ 1116 and 1117. Accordingly, we reverse.

I.

The facts are, for the most part, undisputed.¹ In May 1985, Bhajan Lal, the Chief Minister of the state of Haryana, India, came to New Orleans for eye surgery.² Before his arrival the Indian embassy notified the State Department of his impending visit, expressing concern that Lal, a Hindu, might be the target of an attack by Sikh extremists. Although State Department personnel did not follow their customary paperwork procedures for designating Lal as an official guest, they initiated security measures to protect Lal. The State Department directed its local special agent, named Nagel, to alert the New Orleans Police Department of Lal's expected arrival, which he did. Several days later the FBI notified the State Department that two Sikhs had attempted to recruit someone to assassinate Lal. Nagel, as instructed by his superiors in Washington, D.C., relayed this information to the New Orleans police and requested them to increase the number of officers assigned to protect Lal. The State Department directed Nagel to continue monitoring the situation. The following day the FBI reported to the State Department that the two Sikhs had purchased a weapon in Alabama and were en route to New Orleans to assassinate Lal. Nagel notified the

¹To the extent any facts are disputed, on review "we take all the allegations of the indictment as true." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16, 72 S.Ct. 329, 332 n.16, 96 L.Ed 367 (1952); *United States v. Barta*, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981).

²The reader is assured that this is a real case, not a moot one.

police and then participated in the ensuing events. That evening three of the defendants were seen in the vicinity of Lal's hotel. They were detained and later arrested. During that time, one of them told police officers that the members of the group were "together" and that they had come to "hurt him." Subsequently, the State Department dispatched a detail of seventeen special agents to further protect Lal.

The Government indicted the five defendants for conspiring to kill Lal in violation of 18 U.S.C. §§ 1116 and 1117. Section 1116 makes killing or attempting to kill a "foreign official, official guest, or an internationally protected person" a federal crime.³ Under § 1117, conspiring to violate § 1116 is also a federal crime.⁴

The superseding indictment alleges that Lal was a "foreign official, internationally protected person, and official guest" as defined in § 1116. The district court entered an order dismissing the indictment on the grounds that Lal did not fall within any of these three classifications. The Government brings this appeal pursuant to 18 U.S.C. § 3731. The Government does not appeal the court's ruling that Lal did not qualify as an "internationally protected person," but does challenge the court's determination that Lal was not an "official guest" or a "foreign official."

[1] The issue is whether the Secretary of State, through the State Department's actions, "designated" Lal an "official guest" within the meaning of § 1116.⁵ Section 1116(b)(6) defines an "official

³Section 1116(a) provides:

"Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

⁴Section 1117 provides:

If two or more persons conspire to violate section 1111, 1114, or 1116 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

⁵Because we ultimately conclude that the Secretary of State designated Lal an "official guest," we do not reach the question whether Lal qualified as a "foreign official."

guest" as "a citizen or national of a foreign country present in the United States as an official guest of the Government of the United States pursuant to designation as such by the Secretary of State." The defendants argue that Chief Minister Lal does not qualify as an "official guest" because the State Department failed to complete the paperwork required by its internal procedures. The Secretary of State promulgated these procedures pursuant to his statutory rule-making authority. 22 U.S.C. § 2658. Under these rules, the Secretary delegated the task of designating official guests to the Chief of Protocol. 22 C.F.R. § 2.4 (1985). The Chief of Protocol receives requests for such designations through regular State Department channels and formally confers this status on foreign visitors by placing their names on an official guest roster.

[2] The Government contends that the State Department's internal procedures should not be dispositive of Lal's status. Despite formal inaction, the United States avers that "the actual treatment of Chief Minister Lal as an official guest was sufficient to confer federal jurisdiction over the attempt to murder him." It contends that the State Department's activities in protecting Lal rise to the level of "designation" as an "official guest." These actions evince the State Department's special interest in Lal, distinguishing him from the ordinary foreign visitor. The Department treated him as an "official guest," although he was not formally named one. Furthermore, had the Chief of Protocol received a request, Lal's name would have been placed on the "official guest roster."

Defendants respond that it is immaterial whether Lal "could have been, would have been, or was treated" as an "official guest." There is no evidence that the Secretary of State or Chief of Protocol made this designation, or that anyone requested them to designate Lal as an "official guest."⁶ Defendants suggest that "designation" implies a formal procedure, and there is no indication that Congress intended an uncommon definition of that term.

The United States suggests in addition that the State Depart-

⁶Defendants also note there is no evidence that Lal was ever invited by the Government. We find no requirement in the language of the statute or in the legislative history that the foreign visitor must have been invited by the Government to obtain "official guest" status.

ment's non-compliance with its internal procedures is irrelevant to this criminal proceeding. It relies on *United States v. Caceres*, 440 U.S. 741 (1979), where an Internal Revenue Service agent failed to comply with IRS regulations on the electronic monitoring of conversations. The Government sought to introduce the tapes of several conversations as evidence in the taxpayer's criminal trial. The Court held that where neither the Constitution nor federal law mandate the procedures, a court need not enforce these procedures in a criminal trial. Here, the statute does not mandate the procedures adopted by the Secretary of State and Congress did not provide guidelines by which the Secretary should make the designation. The whole structure was a departmental project. In addition, the defendants have no Constitutional, i.e. due process, rights in seeing that the State Department followed its internal procedures; to sustain a conviction under this statute, the Government need not show the defendants knew of the victim's "official guest" status. The defendants respond that *Caceres* is inapposite because it involves an evidentiary, not a jurisdictional, issue. They reiterate that for jurisdiction to exist under § 1116 on the basis of the victim's "official guest" status, the Chief of Protocol must have granted that status.

II.

This is a case of first impression. "As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911, 60 L.Ed.2d 508 (1979). More than a decade ago, the Congress recognized the nation's special obligations under international law to protect certain foreign visitors, yet at that time no federal jurisdiction existed to permit the government to act directly to discharge those obligations. For the prosecution of those who perpetrated violence against foreign visitors on United States soil, the United States had to rely on the cooperation of state authorities, with no way to assure the foreign country that such cooperation would be forthcoming or that the local resources would be adequate. H. Rep. 1268, 92d Cong., 2d Sess. 7 (1972). The law establishes federal jurisdiction, concurrent with the states, to proceed against those who commit violent acts against foreign officials, their family members, or against official guests, and thus "adversely affect the foreign

relations of the United States." Declaration of Policy, Pub. L. 92-539, 86 Stat. 1070 (1972).

The original House Bill covered only "foreign officials." Then, before the Senate considered the legislation, the Israeli Olympic athletes were murdered in Munich. In reaction to this terrorist outrage, Senator McClellan confected the "official guest" category, noting that "had the situs of the tragedy been the United States, no federal jurisdiction would exist despite the fact that our responsibilities would parallel those which exist vis-a-vis visiting diplomatic personnel." The Committee agreed with Senator McClellan and added in its committee report that the official guest provision not only would cover foreign visitors such as Olympians, but would "also operate to protect the rights of visiting artists, academic and scientific groups, and other groups *and individuals who ought not be beyond the pale of Federal concern.*" S. Rep. 1105, 92d Cong., 2d Sess. 9 1972, *reprinted in U.S. Code Cong. & Ad. News* 4316, 4319 (emphasis added). Congress accepted the Senate amendment, thus vesting wide discretion in the Secretary of State to determine who should be accorded "official guest" status.

[3] Defendants rest their argument on the failure of the Chief of Protocol to designate Lal formally as an "official guest." We therefore direct our attention to the requirements that must be satisfied to effect a "designation," interpreting the statute according to its plain language as we customarily do unless a clear, contrary legislative intention is apparent. *United States v. Apfelbaum*, 445 U.S. 115, 121, 100 S.Ct. 948, 952, 63 L.Ed.2d 215 (1980). *Webster's Third New International Dictionary* defines "designate," in pertinent part, as "to choose and set apart" or "to distinguish as to class." The essence of "designation," in this context, is distinguishing one class of foreign visitors — "official guests" — from other foreign visitors. The question is whether the State Department decided to place Lal in this special class. The record shows that the State Department took substantial measures to insure Chief Minister Lal's safety while he was in the United States. Even before Lal's arrival, the State Department had initiated communication with the New Orleans Police Department; their local agent continued to inform the police and to monitor the situation as it unfolded. Then, the State Department went so far as to dispatch special agents to protect Lal against a Sikh attack. It is obvious that the State Depart-

ment does not take such measures on behalf of ordinary foreign visitors. This conduct in itself demonstrates that decisions were made within the Department to place Lal within a class receiving special treatment. We find this conduct more than adequately demonstrates the State Department's special interest in this foreign visitor, one whose presence in the United States is of significance to our nation's foreign affairs.⁷

[4] We have no difficulty concluding that the State Department can confer "official guest" status not solely through ministerial acts, but by its informal conduct as well. The statutory language and legislative history do not indicate that Congress was concerned with the method by which the Secretary of State designates foreign visitors as "official guests."⁸ To the contrary, the record shows that, in practice, the Chief of Protocol's formal designation does not dictate when and what federal resources will be expended in the treatment of foreign visitors on our soil. Sensitive diplomatic considerations animate such decisions as these.

We are satisfied that Congress intended to extend federal prosecutorial jurisdiction to cases such as this one. An Indian dignitary was on United States soil. A Hindu, he was a member of a group that had been attacked by Sikh extremists in the recent past. Had harm come to him in the United States, such a thing was no matter of governmental indifference and might well have affected our foreign relations with India. In light of this, it would be both shortsighted and small-minded to turn the question of federal jurisdic-

⁷Today's case involves State Department conduct occurring before and during an alleged criminal conspiracy. We do not pass on the issue whether, through formal procedures or through conduct, the Secretary of State may designate an individual an "official guest" after the occurrence of the criminal acts in question.

⁸The Supreme Court's decision in *United States v. Caceres*, 440 U.S. 741 (1979), supports our conclusion. *Caceres* teaches that a court need not enforce an agency's procedures in a criminal trial, when neither federal law nor the Constitution mandate those procedures. Today's case involves only statutory interpretation. We conclude that § 1116 allows the Secretary of State to make "official guest" designations either through State Department conduct or through the Department's formal procedures. Thus, *Caceres* more than assures us that we are not left at the mercy of the State Department's internal procedures in this criminal proceeding.

tion on the completion of a ministerial task, when Congress intended that federal prosecutorial machinery be available in matters implicating the conduct of this country's foreign affairs.

Accordingly, we REVERSE the district court's order dismissing the indictment and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA * CR. ACTION
VERSUS * NO. 85-159
GURPARTAP SINGH BIRK, ET AL* SECTION "J"

ORDER OF DISMISSAL

This matter is before the Court on a motion by defendants to dismiss the indictment for the reasons that this court has no jurisdiction.

In order for the alleged conspiracy to assassinate Mr. Bhajan Lal, Chief Minister of the State of Haryana, India, to constitute a federal crime, Mr. Lal must have been a "foreign official", "official guest", or "an internationally protected person" as defined under the provisions of Title 18, United States

Code, Section 1116. Since he is not included within the definitions under the statute, the indictment does not charge a federal crime. Hence, this Court has no jurisdiction and the indictment is hereby DISMISSED.

New Orleans, Louisiana, this the 4th day of September, 1985.

/s/Patrick E. Carr
UNITED STATES DISTRICT JUDGE

APPENDIX C

18 U.S.C. §1116.

Murder or manslaughter of foreign officials, official guests, or internationally protected persons

(a) Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life, and any such person who is found guilty of attempted murder shall be imprisoned for not more than twenty years.

(b) For the purposes of this section:

(1) "Family" includes (a) a spouse, parent, brother or sister, child, or person to whom the foreign official or internationally protected person stands in loco parentis, or (b) any other person living in his household and related to the foreign official or internationally protected person by blood or marriage.

(2) "Foreign government" means the government of a foreign country, irrespective of recognition by the United States.

(3) "Foreign official" means--

(A) a Chief of State or the political equivalent, President,

Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of Cabinet rank or above of a foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, while in the United States; and

(B) any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee.

(4) "Internationally protected person" means--

(A) a Chief of State or the political equivalent, head of government, or Foreign Minister whenever such person is in a country other than his own and any member of his family accompanying him; or

(B) any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection

against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household.

(5) "International organization" means a public international organization designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288) or a public organization created pursuant to treaty or other agreement under international law as an instrument through or by which two or more foreign governments engage in some aspect of their conduct of international affairs.

(6) "Official guest" means a citizen or national of a foreign country present in the United States as an official guest of the Government of the United States pursuant to designation as such by the Secretary of State.

(c) If the victim of an offense under subsection (a) is an internationally protected person, the United States may exercise jurisdiction over the offense if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender. As used in this subsection, the United States includes all areas under the jurisdiction of the United States including any of the places within the provisions of section 5 and 7 of this title and section 101(38) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(38)).

(d) In the course of enforcement of this section and any other sections prohibiting a conspiracy or attempt to violate this section, the Attorney General may request assistance from any Federal, State, or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.

APPENDIX D

18 U.S.C. §1117. Conspiracy to murder

If two or more persons conspire to violate section 1111, 1114, or 1116 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

APPENDIX E

22 U.S.C. §2658.

Rules and regulations; promulgation by Secretary; delegation of authority

The Secretary of State may promulgate such rules and regulations as may be necessary to carry out the functions now or hereafter vested in the Secretary of State or the Department of State, and he may delegate authority to perform any of such functions, including if he shall so specify the authority successively to redelegate any of such functions, to officers and employees under his direction and supervision.

APPENDIX F

22 CFR § 2.4.

Designation of official guests.

The Chief of Protocol shall also maintain a roster of persons designated by the Secretary of State as official guests. Any inquiries by law enforcement officers or other persons as to whether a person has been so designated shall be directed to the Chief of Protocol. The designation of a person as an official guest is final. Pursuant to section 2658 of Title 22 of the U.S.C., the authority of the Secretary of State to perform the function of designation of official guests is hereby delegated to the Chief of Protocol.

2

No. 86-756

Supreme Court, U.S.
FILED

NOV 20 1986

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

GURPARTAP SINGH BIRK, ET AL., PETITIONERS

v.

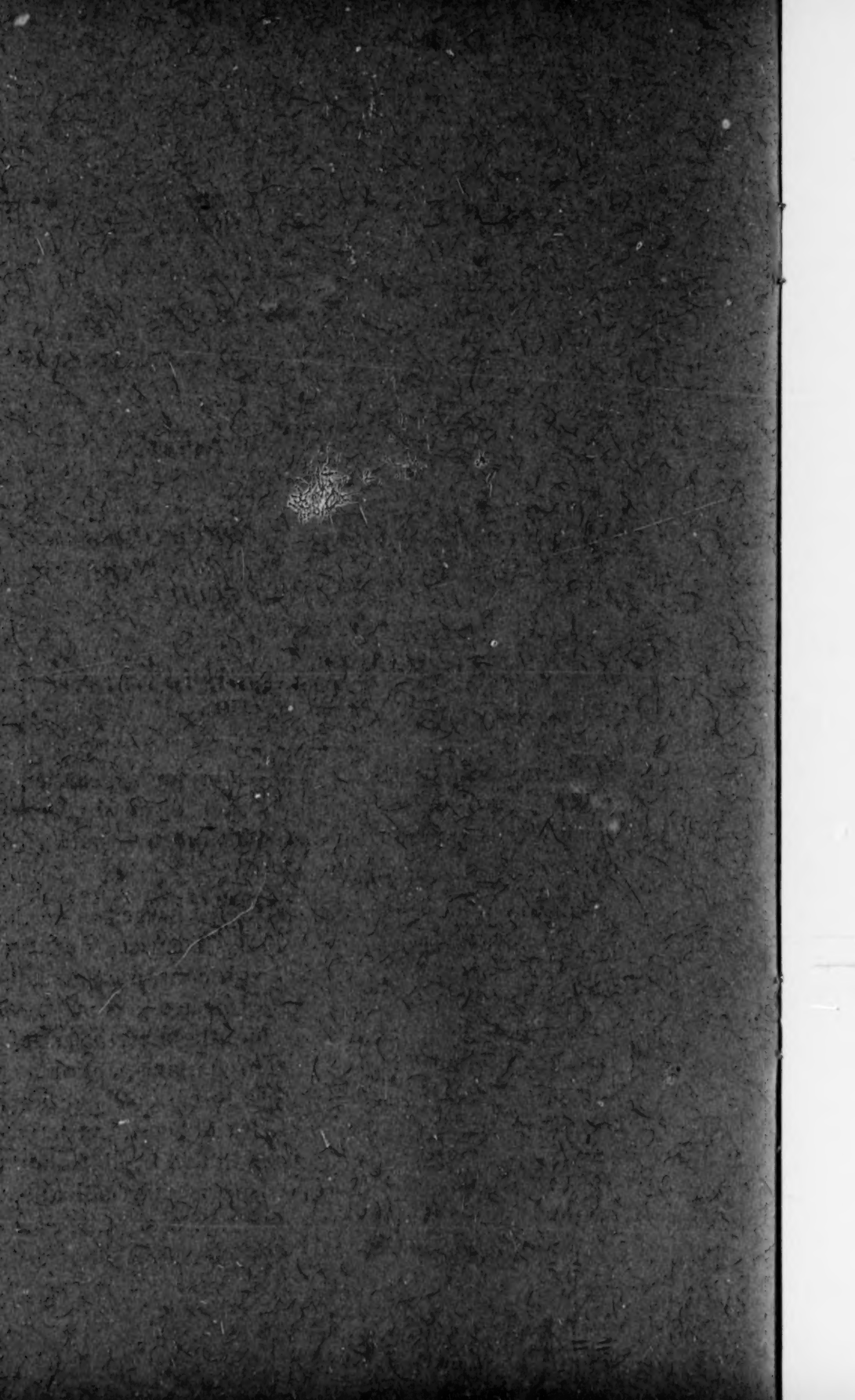
UNITED STATES OF AMERICA

***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT***

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

4 p



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*ON PETITION FOR A WRIT OF CERTIORARI TO
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**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioners contend that the court of appeals erred in reversing an order of the district court dismissing an indictment on the ground that it allegedly failed to state a federal offense.

On May 9, 1985, petitioners were charged in an indictment returned in the United States District Court for the Eastern District of Louisiana with conspiracy to kill one Bhajan Lal, "an internationally protected person," in violation of 18 U.S.C. 1117. Several months later, the grand jury returned a superseding indictment charging petitioners with conspiracy to kill Bhajan Lal, "a foreign official, internationally protected person, and official guest," as defined in 18 U.S.C. 1116(b), in violation of 18 U.S.C. 1116 and 1117. The district court dismissed the superseding indictment on the ground that Bhajan Lal, the Chief Minister of the State of Haryana, India, was not a foreign official, an official

guest, or an internationally protected person, as those terms are defined in 18 U.S.C. 1116 (Pet. App. 39-40). The court of appeals reversed (Pet. App. 30-38). It held that the State Department's activities in protecting Lal bestowed "official guest" status on him within the meaning of 18 U.S.C. 1116 (Pet. App. 33-38).

Petitioner contends that Lal did not qualify as an "official guest" within the meaning of Section 1116, because the Secretary of State, through the Chief of Protocol, did not designate him formally as an "official guest." Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.¹ The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review of the court of appeals' decision would be premature at this time.²

¹It is now more than 15 months since the return of the superseding indictment, more than 18 months since the return of the original indictment, and more than 14 months since the district court's dismissal order. Further interlocutory review at this time would cause additional delay in the final resolution of the charges against petitioners.

²Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

NOVEMBER 1986